89-449

No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's Commerce Clause decisions evaluating evenhanded, non-discriminatory statutes by balancing the burdens on interstate commerce against the benefits of the local policy can be reconciled with the approach adopted by the Third Circuit, under which only the burdens on "interstate relative to intrastate commerce" are taken into account.

2. Whether a Pennsylvania statute barring state-licensed insurers and sellers of insurance from affiliating with banking, lending, or utility companies violates the Commerce Clause, in view of its extraterritorial effect of compelling national insurance companies to avoid such affiliations anywhere in the country, and its clear purpose and effect of providing protection for local insurance sellers against financially diversified, predominantly interstate competitors.

PARTIES TO THE PROCEEDING

Petitioners are United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company.* Respondents are Constance Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, and Intervenors, the Pennsylvania Association of Independent Insurance Agents, John Ulrich, Jr., the Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc.; Charles P. Leach, Jr.; the Pennsylvania Association of Life Underwriters; and Harold E. Alexander.

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* There are no parents, subsidiaries, or affiliates of the named petitioners which are not wholly owned, either directly or indirectly, by one or more of them.

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United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals upon which review is sought (App. A, *infra*, 1a-40a) is reported at 874 F.2d 926 (*USAA II*). The opinion of the district court (App. C, *infra*, 45a-66a) (on remand from a previous decision of the court of appeals) is reported at 680 F. Supp. 712.

The previous opinion of the court of appeals (App. E, *infra*, 68a-87a) is reported at 792 F.2d 356 (*USAA I*), and the opinion of the district court from which that appeal was taken (App. F, *infra*, 88a-104a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a) was entered on May 5, 1989. A petition for rehearing and rehearing en banc was denied on June 9, 1989 (App. B, *infra*, 41a-44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Title 40, Pa. Stat. Ann. § 281 (also referred to as § 641 of the Pennsylvania Insurance Department Act), provides in pertinent part:

> (b) No lending institution, public utility, bank holding company, savings and loan company or any subsidiary or affiliate of the foregoing, or officer or employe [sic] thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.
>
> (c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of this section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

STATEMENT

1. Pennsylvania law provides that "[n]o lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe [sic] thereof, may, directly or indirectly, be licensed . . . as an insurer" in Pennsylvania. 40 Pa. Stat. Ann. § 281(b) (Supp. 1989). As explained in the statute, the purpose of the law is "to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers." *Id.*, § 281(c).

2. United Services Automobile Association and its co-petitioners (hereafter "USAA") are Texas-domiciled insurers duly licensed to transact insurance business in all fifty states, including Pennsylvania. USAA's member-policyholders are present and former officers in the United States armed forces. Like many other large interstate insurers, USAA has long sold its insurance products and services in all fifty states, including Pennsylvania, which is the fourth largest insurance market in the United States.[1] In 1983 alone, USAA received $35,000,000 in premiums from its 40,000 Pennsylvania policyholders. App., *infra*, 70a.

In 1983, USAA, through a subsidiary, applied for and was granted a federal charter from the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation to create and operate a new federal savings bank, to be known as USAA Federal Savings Bank (the "Bank"). The charter was issued and the

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[1] USAA is located in Texas and has no locations or agents stationed in other states; it conducts its interstate insurance business by direct mail and telephone, without use of insurance agents. As a reciprocal interinsurance exchange, it is owned by its policyholders and remits all profits to its member policyholders each year in the form of dividends.

new federal savings bank began operating on December 30, 1983. The Bank is located solely in San Antonio, Texas, and does not sell insurance. It has no Pennsylvania operations, and accepts no deposits from residents of Pennsylvania. App., *infra*, 46a; C.A. App. 49a-51a (*USAA II*).

3. In August 1984, the Pennsylvania Insurance Department notified USAA that its ownership of the Bank in Texas was prohibited by section 641 of the Pennsylvania Insurance Department Act, 40 Pa. Stat. Ann. § 281. App., *infra*, 46a; C.A. App. 148a-149a (*USAA I*). The Department noted that although the Bank's operations were limited to Texas, USAA and its affiliates came within the prohibition of section 281, and thus were in violation of the Pennsylvania law. Thereafter the Department advised USAA that it must divest the Bank or else the Insurance Department would initiate proceedings to revoke the licenses of USAA to transact insurance business in Pennsylvania. App., *infra*, 46a; C.A. App. 128a (*USAA I*).

In late 1984, USAA filed a complaint in the United States District Court for the Middle District of Pennsylvania against the Pennsylvania Insurance Commissioner, seeking to enjoin enforcement of section 281 against it. Shortly thereafter, the Commissioner commenced an administrative proceeding to revoke all of USAA's Pennsylvania insurance licenses. App., *infra*, 46a-47a; C.A. App. 129a (*USAA I*). In 1987, the district court granted the intervention motion of three local associations of independent insurance agents and three named individual agents (App., *infra*, 47a), who pointed out in their intervention papers that they were in the forefront of the passage of section 281, and that they therefore have "a direct interest in its preservation." Motion for Leave to Intervene, at attachment 5 ¶ 14 (June 5, 1987).

Petitioners' federal court complaint challenged, *inter alia*, the application of section 281 to USAA as a viola-

tion of both the Commerce and Supremacy Clauses of the Constitution. USAA filed separate motions for summary judgment on these two points. The district court, after initially deciding the case on other grounds,[2] ultimately ruled that section 281 as applied to ban insurance/banking affiliations outside Pennsylvania violates the dormant Commerce Clause. App., *infra*, 57a-65a.[3] It applied the balancing analysis described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and found that the burdens imposed on interstate commerce by section 281 are clearly excessive in relation to the putative benefits offered in justification of the statute.[4]

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[2] The district court first abstained from exercising its jurisdiction, but that decision was reversed by the Third Circuit. App., *infra*, 68a-87a. That court specifically rejected arguments for abstention pursuant to *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971). In so doing, the Third Circuit considered and rejected the argument that the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1982), in conferring on states exclusive control over regulation of "the business of insurance," conveyed the power to enact legislation like section 281. It stated that "[r]egulations such as section 641 [40 Pa. Stat. Ann. § 281] have no part in the business of insurance under McCarran-Ferguson," because "affiliation between insurers and banks has no integral connection to the relationship between insured and insurer; and banks are not entities within the insurance industry" (App., *infra*, 81a). This Court denied the Commissioner's petition for certiorari from the Third Circuit's decision on the abstention issue. App., *infra*, 67a.

[3] The district court also concluded that it was bound by the appellate court's prior decision finding abstention inappropriate, and rejected USAA's contention that section 281 is preempted under the federal banking laws. App., *infra*, 47a-57a.

[4] The district court proceeded with its balancing analysis notwithstanding its observation (App., *infra*, 57a n.6) that

> USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business. Indeed, it could not make such an argument because Section 641(b) [§ 281(b)] treats all insurance companies and all savings and loans alike, whether or not they are based in Pennsylvania.

After reviewing the justifications of the statute as offered by the Commissioner and intervenors,[5] the district court stated, first, that "the adverse effects of affiliation are either not present where the affiliated bank is outside the jurisdiction, or are readily prevented in ways less burdensome than is prescribed in Section 641(b) [§ 281(b)]" (App., *infra*, 59a). Turning to the burdens imposed on interstate commerce by the statute, and relying on this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the district court found that the burden on USAA's interest in operating a Texas bank was "clearly excessive in relation to the local benefits" (App., *infra*, 63a).[6]

The district court distinguished this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in that "the Maryland statute in *Exxon* did not reach beyond the borders of the state" (App., *infra*, 64a). It simply banned refiners and producers from operating retail stations in Maryland. "In contrast, Section 641 [§ 281], in practical effect, reaches beyond Pennsylvania's borders to interfere with the ownership of a federal savings and loan bank in Texas which was properly ap-

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[5] Those justifications were:

> (1) to protect the insurance industry from, *inter alia*, unfair competition and economic concentration; (2) to protect consumers from coercive "tie-ins" and other forms of subtle pressure tactics by lending institutions; and (3) to protect the ability of the insurance examiners to monitor adequately the insurance industry.

App., *infra*, 59a.

[6] The district court also held that insofar as section 281 may serve a legitimate purpose in regulating affiliations between insurance companies and lending institutions located *within* Pennsylvania where a genuine danger of "tie-in" sales might arise, the statute could be drawn more narrowly to achieve that result. App., *infra*, 63a. The "tie-in" that is of concern under the statute is the conditioning of banking services, especially the granting of credit, on the purchase of insurance from an affiliated company.

proved by and operates under the regulations of the appropriate federal agencies" (App., *infra*, 64a). Accordingly, the district court granted USAA's motion for summary judgment on Commerce Clause grounds and issued a permanent injunction enjoining enforcement of section 281 against USAA.

4. The Commissioner and Intervenors appealed the district court's decision invalidating section 281 on Commerce Clause grounds. The Court of Appeals for the Third Circuit reversed the district court and held that section 281 did not violate the Commerce Clause. App., *infra*, 28a-38a.[7]

The Third Circuit analyzed the Commerce Clause issue by looking to a conception of the relevant burden on interstate commerce that it had recently announced in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). Under that approach, it did not consider the statute's total burden on interstate commerce, but only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce. It is a comparative measure" (App., *infra*, 32a, quoting *Norfolk Southern*).

Reading section 281 to apply equally to bar bank/insurance affiliations whether or not the bank is based in Pennsylvania, the court of appeals found that the burden

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[7] Petitioners cross-appealed from the denial of their summary judgment motion based on preemption. *See* note 3, *supra*. The Intervenor agents later appealed a decision from the Eastern District of Pennsylvania, in which the Ford Motor Company and its insurance, banking, and lending affiliates were parties, which held the statute to be preempted in part. The *USAA* and *Ford* cases, although arising separately, were consolidated for purposes of appeal before the Third Circuit. The Third Circuit decision found section 641 to be preempted to the extent, but only to the extent that it interfered with the acquisition of failing thrifts under supervision of the FSLIC, pursuant to 12 U.S.C. § 1730a(m) (1982). App., *infra*, 19a-28a. USAA does not now seek review of that aspect of the decision below.

on interstate insurers was no different from that placed on intrastate insurers—all were barred from affiliating with banks wherever located. Hence the Third Circuit ruled (App., *infra*, 30a) that:

> Because that statute regulated indiscriminately—affording no preference to in-state interests over others—we cannot conclude that it presented a burden to *interstate* commerce and, in that light, we hold that it did not violate the Commerce Clause.

In reaching this result, the Third Circuit noted the concerns of the district court that section 281, in practical effect, would have a significant economic impact, either forcing USAA "to abandon its insurance business in Pennsylvania or relinquish its interest in the Texas bank" (App., *infra*, 35a). The Court stated that it was not "insensitive" to the burden thus created, but noted that the strategy of expanding the corporate base by acquisition of other companies had been of USAA's "own choosing" and "the companies must expect that they will be required to comply with all applicable state as well as federal regulations" (App., *infra*, 36a). In rejecting petitioners' Commerce Clause argument, the Third Circuit relied heavily on *Exxon Corp. v. Maryland, supra.* It viewed that decision as turning not upon the fact that the Maryland statute in *Exxon* "did not regulate beyond the Maryland borders," but rather upon "the *manner* by which the statute regulated" (App., *infra*, 37a-38a). According to the Third Circuit, "[t]he Court [in *Exxon*] concluded that the fact that the statute regulated *indiscriminately* compelled the conclusion that the Commerce Clause had not been violated" (App., *infra*, 38a).

The court below therefore concluded that section 281 did not violate the Commerce Clause.[8] USAA's timely Petition for Rehearing was denied on June 9, 1989.

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[8] The Third Circuit did not question the district court's finding that, where the affiliated bank is outside the jurisdiction, the purposes of the statute were either irrelevant or readily served in ways less burdensome to commerce. *See* App., *infra*, 30a-31a.

REASONS FOR GRANTING THE PETITION

The Third Circuit, in its decision below and in its prior *Norfolk Southern* decision, has adopted a Commerce Clause analysis that is inconsistent with the balancing approach this Court has found applicable to evenhanded, nondiscriminatory statutes. Rather than weighing the burdens on interstate commerce imposed by the statute against the benefits of the local policies it embodies, the Third Circuit approach here looked solely to the nondiscriminatory basis of the statute—"affording no preference to in-state interests over others"—to support its conclusion that the statute imposes no burden on interstate commerce, and thus could not present a violation of the Commerce Clause. App., *infra*, 30a.

The Third Circuit's approach in this case led to approval of a Pennsylvania statute plainly designed to protect Pennsylvania-based independent insurance agents, and having two types of impermissible effects. Enforcement of the statute will have the extraterritorial consequence of causing national insurance companies and perhaps others to forego affiliations with banking, lending, or utility entities located anywhere in the country. As to other companies committed irrevocably to the prohibited affiliations, most of whom will be interstate businesses, the statute effectively bars entry into the Pennsylvania insurance market. Because of these serious consequences of the decision below, and because of the likelihood that it will mislead courts faced with dormant Commerce Clause issues in the future, the decision of the Third Circuit merits the Court's attention.

I. THE THIRD CIRCUIT'S COMMERCE CLAUSE ANALYSIS NULLIFIES THE BALANCING TEST APPLIED BY THIS COURT IN EVALUATING EVENHANDED, NONDISCRIMINATORY STATUTES.

This Court has made clear that statutes may be invalidated under the Commerce Clause both where they directly regulate in a manner discriminatory against

interstate commerce and, under a separate test, where they operate evenhandedly and have only indirect effects on interstate commerce:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citations omitted). *Accord, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

In its decision in this case, the Third Circuit declined to engage in the balance of burdens on interstate commerce against local benefits that is appropriate in the instance of evenhanded statutes. Instead it simply concluded (App., *infra*, 38a) from section 281's nondiscriminatory character that the statute could not violate the Commerce Clause:

> To the extent that the regulation infringes upon the commercial association rights of lending institutions outside of Pennsylvania, it infringes upon those same rights of lending institutions within Pennsylvania. In that light, even if § 641 [40 Pa. Stat. Ann. § 281] is viewed as "protectionist" of the economic interests of unaffiliated insurers, because it does not afford that protection only to local agents, it is not violative of the Commerce Clause.[9]

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[9] The court of appeals recognized that "even a statute that is facially indiscriminate may nonetheless be determined to be violative of the Commerce Clause because it has a discriminatory effect"

The Third Circuit reasoned, more specifically, that the court need not consider the statute's total impact on interstate commerce, but only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce" (App., *infra*, 32a).[10] Because evenhanded statutes by definition do not discriminate against interstate commerce relative to intrastate commerce, the Third Circuit approach truncates the Commerce Clause analysis prior to the balancing process which this Court has mandated. It is therefore directly at odds with decisions of this Court that have viewed as relevant the entire burden on interstate commerce—even where the statutes are not discriminatory on their face or in their application to individual entities.[11]

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), an Illinois statute restricted the ability to make a tender offer anywhere for shares of an Illinois-affiliated corporation. Intrastate purchases were burdened in the same way

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(App., *infra*, 38a n.19). The court was quite clear, however, that a statute which treats in-state and out-of-state entities the same, both on its face and as it operates in context, cannot violate the Commerce Clause.

[10] In this respect the court relied on the definition of the relevant burden it had first announced in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

[11] This Court has recognized that "no clear line" separates state regulation that is per se invalid because it effects a discrimination against interstate commerce, and the category of evenhanded regulation subject to balancing. *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. at 579. "[E]xperience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 108 S. Ct. 2218, 2220-2221 (1988) (statute could have been struck down as discriminatory, but Court chose instead to balance); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 41 (1980) (statute could have been struck down as per se invalid, but Court chose instead to balance).

as interstate purchases. Yet this Court held that the burden on interstate commerce was too great. *Id.* at 647. *Cf. CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94 (1987) (in upholding Indiana anti-takeover statute, Court discussed alleged burden on interstate commerce without discussing that burden relative to the burden on intrastate commerce). More generally, the Court has regularly referred simply to the "effects on interstate commerce," rather than to the relative or incremental burden considered by the Third Circuit. *E.g., Pike v. Bruce Church, Inc.*, 397 U.S. at 142; *Edgar*, 457 U.S. at 640 ("the burden the Act imposes on interstate commerce"); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978) ("the extent of the burden imposed on the course of interstate commerce"); *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 472-474 (finding no Commerce Clause violation in the case of a nondiscriminatory statute, but only after an extensive analysis of the "burden imposed on interstate commerce").[12]

The courts of appeals have likewise considered the effect on interstate commerce as a whole to be a proper

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[12] In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 108 S. Ct. 2218, 2220 (1988), the Court began its analysis by stating:

> Where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be either a discrimination that renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579 (1986).

In so stating, the Court accurately described the situation actually present in *Bendix*, where the challenged provision discriminatorily tolled the statute of limitations as to out-of-state but not in-state corporate defendants. In view of the Court's other decisions, we do not believe that this statement can be read to suggest that Commerce Clause violations can never occur in statutes that are facially evenhanded. Indeed, the *Bendix* Court's citation of *Brown-Forman Distillers*—and to the pages setting out the balancing test—suggests just the opposite.

basis on which to invalidate a state statute. This is especially clear in a number of cases where state statutes have been invalidated even though they applied evenhandedly and in the same manner to interstate and intrastate transactions. In these cases, the courts have looked beyond that evenhanded application—in a way that the Third Circuit did not—to consider the entire impact of the statute on interstate activities. The decisions to strike down these statutes have come notwithstanding and without comparative analysis of substantial, similar burdens on intrastate commerce effected by the same provisions.

In *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976), the court struck down a Chicago ordinance requiring that production facilities for all milk sold in Chicago be inspected by city inspectors, notwithstanding that they had already been subjected to the rigorous inspection and other health standards required under a regime recommended by the United States Public Health Service and adopted in most states. Suit was brought by an Indiana dairy, and the ordinance was invalidated due to the "burden imposed on interstate commerce" by the requirement of duplicative inspections. *Id.* at 1308. The court reached this conclusion notwithstanding that the count of the complaint alleging discrimination against interstate commerce had been dismissed, *id.* at 1307, and that the court could not conclude from the record whether Illinois processors were treated any differently from those based out of state. *Id.* at 1306.

In *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 631 F.2d 67 (5th Cir. 1980), *summarily aff'd*, 454 U.S. 884 (1981), the court struck down the application of a nondiscriminatory Louisiana licensing, inspection, and fee assessment statute to out-of-state processors of dairy products produced for ultimate consumption within Louisiana, where those processors conducted no activities or transactions within the state. The court en-

gaged in an explicit balance of burdens and benefits and struck down the statute as so applied, notwithstanding its evenhanded application.

In a number of cases involving state anti-takeover statutes, the appellate courts have found Commerce Clause violations, notwithstanding that the statutes imposed precisely the same burdens and restrictions intrastate as on interstate transactions. In *Hyde Park Partners v. Connolly*, 839 F.2d 837 (1st Cir. 1988), for example, the court was presented with a Massachusetts statute requiring, as to corporations organized or having their principal place of business in Massachusetts, disclosure of intent to gain control of a target company before acquiring as much as five percent of the stock. The statute further provided for a delay of one year in pursuing a takeover bid as a penalty for a failure to so disclose. Noting that the statute was "non-discriminatory, because it applies equally to both intrastate and interstate offerors," *id.* at 844, and holding the balancing approach of *Pike* to be applicable, 839 F.2d at 845, the court found the one-year penalty provision to be in probable violation of the Commerce Clause. *Id.* at 847-848.[13] In so doing, the court relied on the statute's "direct and substantial" effect on interstate transactions. *Id.* at 847. It reached this conclusion without any effort to assess the relative burden on interstate as compared with intrastate transactions, notwithstanding its recognition that such local transactions existed and were identically impacted.[14]

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[13] The case arose on appeal of a preliminary injunction against enforcement of the statute. Given the case's posture, it was not appropriate for the court of appeals to render a definitive decision concerning the statute's constitutionality, and it did not do so.

[14] There are two senses in which state anti-takeover statutes may be said to impact on intrastate commerce. First, as to virtually any tender offer, it may be anticipated that many individual intrastate transactions—purchases of stock between offeror and offeree residing in the same state—will be involved. Alternatively, viewing the tender offer as a single transaction, it will sometimes be the case

Similarly, in *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425 (10th Cir. 1983), the court was presented with an Oklahoma statute applicable to companies affiliated with Oklahoma in one of several defined ways, such as being incorporated in Oklahoma, having substantial assets, activities, or its principal place of business there, or having ten percent of any class of equity securities owned by individuals residing there. Under the statute, those making a tender offer for shares of a covered corporation were required to make certain disclosures and afford offerees various other rights. A state official was given the power to pass on the adequacy of disclosures made, and thus to prohibit or at least delay the consummation of such tender offer. *Id.* at 1427. Relying heavily on this Court's decision in *Edgar*, the Tenth Circuit focused especially on the statute's "extraterritorial reach," and struck it down due to its "substantial burden on the interstate trade in securities." *Id.* at 1429. It did so without attention to the fact that intrastate and interstate stock sales were impaired in exactly the same manner, and without any comparative analysis of interstate and intrastate burdens.

Other circuits, evaluating divers provisions of various state anti-takeover statutes, have likewise struck them down on the basis of their burden on interstate commerce, without regard to the comparative burden analysis employed below. *Tyson Foods v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1283-1287 (5th Cir. 1978), *rev'd on other grounds*, 443 U.S. 173 (1979).

In sum, the decision below cannot be squared with the Commerce Clause decisions of this Court and of other courts of appeals. Review by this Court is necessary to resolve the conflict in this important area.

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that the offeror and all offerees are located in a single state, so that the entire tender offer is intrastate.

II. PENNSYLVANIA'S INSURANCE ANTI-AFFILIATION STATUTE VIOLATES THE COMMERCE CLAUSE BECAUSE IT HAS THE EXTRATERRITORIAL EFFECT OF FORCING NATIONAL INSURANCE COMPANIES TO REFRAIN FROM CERTAIN AFFILIATIONS ANYWHERE IN THE COUNTRY AND BECAUSE IT DISCOURAGES COMPETITION WITH LOCAL INSURANCE COMPANIES AND AGENTS BY DIVERSIFIED, PREDOMINANTLY INTERSTATE COMPETITORS.

The court of appeals' failure to consider any statutory burdens on interstate commerce not discriminatory on their face or as applied caused it to overlook two fundamental and obvious characteristics of the statute that place it in violation of the Commerce Clause. Specifically, the statute has substantial extraterritorial consequences, and it is protectionist legislation, both in intent and effect.

Most importantly, as the district court found, Pennsylvania's insurance anti-affiliation statute constitutes extraterritorial regulation of interstate commerce. App., *infra*, 64a. The Commissioner's enforcement of the statute has both the purpose and the practical effect of prohibiting affiliations not only within Pennsylvania, where some legitimate local interests might arguably be served by such prohibition, but also in the other forty-nine states. The decision below thus creates an important national problem. Pennsylvania is the fourth largest insurance market in the country, and virtually all large interstate sellers of insurance are licensed and do substantial business there. As a practical matter, many large interstate insurance companies cannot abandon their insurance activities in such a major market as Pennsylvania.[15] The effect of section 281 is therefore to dictate that large interstate sellers of insurance not affiliate with banks

[15] The Third Circuit in *USAA I* acknowledged that a revocation of USAA's license to sell insurance in Pennsylvania would have "devastating economic consequences" for USAA. App., *infra*, 77a.

located in other states, even if those banks, as in USAA's case, have no Pennsylvania operations.

It requires little argument to demonstrate that a statute with these characteristics and effects raises serious questions under the Commerce Clause. The statute's extraterritorial effects are sufficient on their own to invalidate the statute. As this Court has stated, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar*, 457 U.S. at 642-643; *Healy v. Beer Institute*, 109 S. Ct. 2491, 2499 (1989).[16] In *Healy*, as in *Edgar*, the Court held that a state law that has the "practical effect" of regulating commerce occurring wholly outside the state's borders is invalid under the Commerce Clause. 109 S. Ct. at 2499; 457 U.S. at 643.

Like the liquor-related laws at issue in *Brown-Forman Distillers v. New York State Liquor Authority*, *supra*, and *Healy*, the Pennsylvania statute uses the leverage of its state licensing authority to compel actions relating to wholly out-of-state activities. In the liquor cases, permission to sell liquor in the state was contingent on certain affirmations as to prices relative to prices in other states, thus limiting market decisions that could be made in those other states. Here, Pennsylvania is using the powerful leverage of its insurance licensing authority to forbid certain commerce that would occur entirely outside its borders, forcing insurance companies to divest

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[16] In an older case involving the insurance industry, *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926), the Court, in an opinion by Justice Holmes, struck down a state statute making it unlawful for any insurance company authorized to do business within the state to pay a fee to anyone residing outside the state in connection with policies on in-state risks. The Court concluded that the insurance company could not constitutionally "be prevented from employing and paying those whom it needs for its business outside the State." *Id.* at 435.

(or not affiliate with) financial institutions that are located in other states and, like USAA's bank, have no Pennsylvania operations.[17]

The consequences of the Third Circuit's decision will be immediate and substantial. As the record below shows, the Insurance Commissioner has decided that the broad prohibition of section 281 should be read literally and that administrative enforcement actions should be taken in appropriate instances. C.A. App. 164a-165a (*USAA I*). Moreover, when this litigation commenced in 1984, the Commissioner had identified 30 companies in apparent violation, and had determined to conduct further investigation to identify additional potential violations. *Id.* Without a ruling from this Court, the Third Circuit's decision will distort the otherwise growing national trend toward integration of financial services. No state should be permitted to force its views as to the legality of such integration upon the other forty-nine states.

In addition to its extraterritorial regulation, section 281 is a protectionist statute in both intent and effect. By excluding any entities affiliated with a bank, lending institution, or public utility from engaging in the business of selling insurance in Pennsylvania, section 281 was intended to protect the independent insurance agencies operating in the state, some of whom have intervened in support of the law. *Central Mortgage Co. v. Pennsylvania Insurance Dept.*, 100 Pa. Commw. 233, 514 A.2d 956,

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[17] To a significant extent, section 281 thus invades the prerogatives of other states to regulate economic activity and affiliations within their own borders. Some states have made the policy choice to permit the kind of affiliations that section 281 prohibits insurance companies doing business in Pennsylvania from maintaining anywhere. South Dakota law, for example, provides: "Any insurance company, directly or through subsidiaries, may engage in all facets of the banking business . . . ." 58 S.D. Cod. Law Ann. § 27-85 (1989). And the Texas Insurance Department, in the instant case of USAA's proposed bank acquisition, interposed no objection.

958 (1986), *aff'd*, 517 Pa. 64, 534 A.2d 759 (1987). More specifically, it was designed to prevent competition in insurance sales between insurance agents and certain types of financial institutions. App., *infra*, 81a. In part, this was justified by a view that competition would be unfair if it pitted independent agents against larger economic entities. *See* § 281(c); App., *infra*, 59a. Also, the statute was designed to protect against "unfair competition" in the form of tie-ins linking purchases of other products or services to the purchase of insurance. *Id.*

Whether or not it was the specific intention of its draftors, the statute has its primary impact on large, interstate firms. As Acting Deputy Insurance Commissioner Ronald Chronister testified in this matter before the Pennsylvania Insurance Department, it is primarily large companies that have expressed the greatest interest in entering an integrated financial system engaged in both the banking and insurance businesses. Transcript, Pa. Ins. Dept. Docket No. C84-12-5 (November 14, 1985) at 43 ("Transcript"). Indeed, Chronister specifically mentioned various insurance companies and banks, all of which were major interstate entities.[18]

A significant effect of the statute is thus to discourage the sales in Pennsylvania of insurance products by inter-

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[18] Deputy Commissioner Chronister testified, in part, as follows:

> Q. How would you describe the companies, whether insurance or financial institution, that have come to this Department seeking integration: large, small?
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> A. They have been the large companies, large life insurers such as John Hancock or Prudential, property casualty companies, Allstate. Large insurance companies have been the insurance companies who have expressed the greatest interest in entering an integrated financial system.
>
> From everything I have read, again, it is the large banks such as Citibank and those (sic) which have expressed the greatest interest in the banking side to enter the integrated financial area.

Transcript at 43.

state businesses, and the volume of interstate business thus affected is potentially very large. In addition to USAA, a significant number of interstate companies now doing business in Pennsylvania are subject to exclusion from the state's insurance market by virtue of mixing insurance with banking, lending, or utility activities. The prohibition on affiliation will drive some interstate insurance companies out of Pennsylvania, and will deter entry into the market by others.[19]

The protectionist character of the statute—aimed at protecting a particular economic group against the consequences of competition—adds to the statute's suspect character. As this Court has explained:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.

City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978).[20] Whatever may be the permissibility of government action protecting one intrastate competitor against another, a different and more serious problem arises when, as here, a significant aim or consequence

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[19] For the foregoing reasons, the court of appeals is wrong in concluding (App., *infra*, 38a n.19) that "[n]othing in the records of the present cases . . . indicates that enforcement of the [Pennsylvania statute] will have the effect of favoring in-state interests over out-of-state interests."

[20] "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977), or discriminatory effect, see *Philadelphia v. New Jersey, supra*." *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984).

of such protectionism is to exclude products originating outside the state.

Because section 281 has the latter economic consequence, the court of appeals' heavy reliance (App., *infra*, 36a-38a) on this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), is misplaced. In *Exxon*, the Court upheld the constitutionality of a Maryland statute that prohibited companies that refined petroleum from owning retail service stations within Maryland. The record in that case revealed that all gasoline ultimately came from out-of-state refiners, so that the exclusion of refiners from the business of retailing affected the particular parties making retail sales, but not the amount of gasoline moving in interstate commerce. *Id.* at 125. Here, unlike in *Exxon*, entities located within Pennsylvania not only sell insurance but "produce" the underlying insurance product.[21] Thus it cannot be said here, as the Court stated in *Exxon*, that any interstate company excluded by the statute will "be promptly replaced by other interstate" companies. 437 U.S. at 127. On the contrary, it may be anticipated that the reduction of competition by large, diversified—and usually interstate—competitors will increase the insurance business of Pennsylvania-based insurers and agents.[22]

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[21] For example, CIGNA, a very large international insurance company operating in a wide range of markets, is incorporated in Pennsylvania and has its principal place of business in Philadelphia.

[22] The statute considered in *Exxon* was different from that presented here in other respects as well. In *Exxon*, Maryland was attempting to deal with market problems resulting during the oil shortage from vertical integration of producers and retailers. Specifically, refiners tended to give preferential treatment to their own retailers, so that the vertical integration was perceived to result in unfair competition in the retail market. Here, the affiliation prohibited is horizontal rather than vertical, and the perceived competitive anomaly resulting from a reliable and exclusive supply of the product, whether in- or out-of-state, is not present. Pennsyl-

In short, unless the decision below is overturned, the Pennsylvania statute will have serious extraterritorial and protectionist consequences. Both the insurance and the banking industries will be directly affected. The economic significance of the case is by itself reason for the Court to grant review.

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vania's concerns deal instead with particular practices—including tying—that it fears may be engaged in by competitors within the State's insurance market if certain affiliations are allowed. The prohibition of affiliations with out-of-state entities, which play no part in insurance competition within Pennsylvania, is thereby largely irrelevant to these concerns. *See* App., *infra*, 59a.

Further, unlike *Exxon*, the practices which are of concern here can be addressed directly, by legislation proscribing unfair credit and insurance practices. There is therefore no justification for barring the underlying affiliation—with the accompanying impairment of interstate commerce—even where affiliations with Pennsylvania entities are involved. In *Exxon*, where the perceived market problem resulted simply from refiners' delivery of gasoline to their own retailers in a time of shortage, there was no identifiable misconduct that Maryland could seek to regulate as a substitute for barring the affiliation entirely.

CONCLUSION

The petition for a writ of certiorari should be granted.[23]

Respectfully submitted,

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[23] The Court may wish to consider holding this case for *Lewis v. Continental Bank Corp., prob. juris. noted,* 109 S. Ct. 2446 (1989). That case presents, among other issues, the question whether a Florida statute barring all further state charters for industrial savings banks, which is thus nondiscriminatory on its face, is nonetheless in violation of the Commerce Clause, based on its identifiable purpose and effect of discriminating against interstate entities. The present case similarly involves a statute that is nondiscriminatory on its face, which petitioners argue is nonetheless invalid under the Commerce Clause due in part to its real life protectionist effect against interstate financial entities. Thus it is possible that *Lewis* may shed light on the proper resolution of this case. However, the Third Circuit's decision here presents a conflict in the circuits that is not involved in *Lewis*, and the present statute is substantially objectionable due to its extraterritorial effects, which also are not present in *Lewis*. In addition, *Lewis* presents a substantial mootness question which may well result in none of the common issues even being discussed. Accordingly, we urge the Court to grant the petition rather than to hold it for *Lewis*.